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No. 99-2035

IN THE
Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

What are the appropriate standard of review and legal analysis for a federal appellate court, on appeal of district court's denial of a new trial motion under Federal Rule of Civil Procedure 59, to employ in determining the constitutionality of a punitive damages award under the Due Process Clause.

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INTEREST OF *AMICUS*[1]

The Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies, and the courts on behalf of the railroad industry.

Jury verdicts awarding excessive punitive damages are a matter of serious and growing concern to railroads. Railroads have a presence in 49 states, where 555 freight railroads operate over 170,000 miles of track. Association of Am. R.Rs., *Railroad Facts* 3 (2000). Despite enormous progress in railroad safety, accidents still occur, and by their nature often involve fatalities and severe injuries. Federal R.R. Admin., U.S. Dep't of Transp., *Railroad Safety Statistics Annual Report 1999*, at 1-7 (2000) (Table 1-1), *available at* http://safetydata.fra.dot.gov/objects/bull99.pdf. In 1999, railroad accidents and incidents involving the general public resulted in 949 lawsuits being filed against railroads. Association of Am. R.Rs., *1999 Claim & Litigation Report* 3-7 & 3-8 (Aug. 2000). Given that trials involving fatalities or serious injuries are often emotionally charged, railroads, like other interstate businesses, have been subject to large but unjustified punitive damage awards. See, *e.g.*, *CSX Transp., Inc.* v. *Palank*, 743 So. 2d 556, 564 (Fl. Dist. Ct. App. 1999) ($50 million in punitive damages awarded to decedent's estate in action arising out of train derailment), *cert. denied*,

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[1] This brief is submitted with the consent of counsel for all parties. No person or entity, other than *amicus* and its members, made any monetary contribution to the preparation of this brief, and no counsel for any party authored this brief in whole or part.

121 S. Ct. 65 (2000); *Alcorn* v. *Union Pac. R.R.*, No. CV97-31927 (Jackson County Mo. Cir. Ct. Sept. 27, 1999) ($50 million in punitive damages). For that reason, AAR and its member railroads have an abiding interest in assuring that jury awards of punitive damages are subjected to proper and adequate review by the courts.

Moreover, the experience of the railroad industry underscores the need for this Court, in determining the proper appellate standard of review, to consider the many kinds of errors affecting punitive damages that are raised in new-trial motions and that an appellate court may be called upon to review. In federal as well as state court, large punitive damages awards are often the result of improper attorney argument or evidentiary rulings that give the jury a distorted picture of the dangerousness of a situation allegedly created by the railroad and the claimed reprehensibility of its conduct. The narrow question of whether appellate courts review determinations of the constitutionality of punitive damages awards *de novo* or for abuse of discretion cannot be answered without broader consideration of the role of the appellate courts in review of district court new-trial rulings under Federal Rule of Civil Procedure 59.

The AAR has a special interest in filing a brief in this case because its view of the proper appellate standard of review is not fully reflected in the positions taken by either of the parties, at least at the certiorari stage. The federal appellate courts have an obligation to conduct a *de novo* legal analysis under *BMW of North America* v. *Gore*, 517 U.S. 559 (1996), of whether the punitive damages award is so "grossly excessive" as to violate the Due Process Clause. Under Federal Rule of Civil Procedure 59, however, a district court may set aside a punitive damages verdict as a matter of discretion, even if the award is not unconstitutional under *BMW*. For example, it may do so if, after reweighing the evidence it finds the verdict to be excessive, or because it determines that certain evidentiary or procedural rulings may have tainted the

punitive damages verdict. Because a denial of a Rule 59 motion does not involve strictly legal questions, but discretionary ones as well, the overall appellate standard of review should be abuse of discretion. All legal questions (including the constitutionality of the verdict) are subsumed within this overall standard. As the Court has repeatedly held, this does not mean that a legal question is treated as a matter of the district court's discretion, or that appellate review of issues of law is any less stringent. The appellate court must make an independent determination of all legal questions, and any error of law by the district court (such as failing to set aside an unconstitutional damages award) is *per se* an abuse of discretion.

STATEMENT

After a jury awarded $4.5 million in punitive damages to respondent Leatherman Tool Group, Inc. ("Leatherman"), petitioner Cooper Industries, Inc. ("Cooper") filed a post-trial motion under Federal Rule of Civil Procedure 59. It argued, *inter alia*, that the award, which was 90 times the amount of compensatory damages, violated the Due Process Clause as interpreted in *BMW of North America v. Gore*, 517 U.S. 559 (1996). The district court denied Cooper's motion, and found that the award of punitive damages was "fairly proportional" given the nature of the conduct, the evidence of intent, and the need to deter a defendant of Cooper's size and assets. Pet. App. 24a. On appeal, the Ninth Circuit affirmed the judgment in relevant part. On the constitutional issue, the court of appeals held that the district court's determination that "the punitive damage award was proportional and fair" was "supported by the evidence," and thus did not violate Cooper's due process rights. *Id.* at 3a. Therefore, the court of appeals held that the "district court did not abuse its discretion in declining to reduce the amount of punitive damages." *Id.* at 4a.

SUMMARY OF ARGUMENT

Under Federal Rule of Civil Procedure 59, the district court, sitting as a "thirteenth juror" and independently evaluating the evidence presented to the jury, has broad discretion to grant a new trial (or to condition denial of a new trial on remittitur) if it deems a punitive damages award to be excessive. In exercising its Rule 59 discretion, the district court applies state-law standards relating to excessiveness (where state law provides the basis for the damages award, as is typically the case). The district court's discretion to deny a new trial motion and uphold a jury verdict is circumscribed by the constitutional prohibition against "grossly excessive" awards of punitive damages, as violative of the Due Process Clause. *BMW of N. Am. v. Gore*, 517 U.S. 559, 562 (1996). Under Rule 59, the district court also has broad discretion to grant a new trial if erroneous evidentiary or procedural rulings or jury instructions prejudiced the defendant and affected the amount of damages awarded.

In determining on appeal whether a verdict upheld by a district court violates the Due Process Clause because the damages are "grossly excessive," an appellate court resolves that legal question *de novo* by performing the analysis of federal constitutional standards set forth in *BMW*. Indeed, this Court has held in analogous circumstances, involving the excessiveness of fines under the Eighth Amendment and the reasonableness of searches and seizures under the Fourth Amendment, that an appellate court reviews *de novo* the application of a constitutional standard to the facts of a case.

The legal nature of the appellate court's determination of the constitutionality of the verdict is not determinative of the appellate standard of review for Rule 59 orders. As a formal matter, the proper standard of review is "abuse of discretion." The reason is that the district court, above and beyond its constitutional duty to set aside grossly excessive verdicts, has substantial discretion to grant a new trial to prevent the

injustice of a damages award that it deems excessive, or that is tainted with evidentiary, procedural, or instructional error. When a federal appellate court is reviewing an order that implicates the discretion of the district court, this Court has held that abuse of discretion is the proper standard, even if the appellate court will decide issues of law in the course of that review. An abuse-of-discretion standard does not mean, however, that the court of appeals yields to the constitutional analysis of the district court. When presented with a claim that a punitive damages award violates the Due Process Clause, the appellate court conducts the same independent, substantive legal analysis of the constitutional issue that it would if a *de novo* standard were applicable. But there is no reason to create multipart standards, where some questions are reviewed *de novo* and others for abuse of discretion. This needlessly complicates the appellate court's task. Accordingly, in like circumstances, this Court has favored a unified abuse-of-discretion standard under which an error of law (here, the failure to set aside an unconstitutional verdict) is *per se* an abuse of discretion.

An abuse-of-discretion standard makes particular sense for Rule 59 determinations. First, in the context of review of excessive compensatory damages awards, this Court has adopted that standard even though it recognized that such review may involve questions of state law. Second, in many instances a district court will set aside a punitive damages award without invoking the Due Process Clause, and a single standard should apply to all Rule 59 determinations regarding excessive damages. Third, even where a damages award is grossly excessive in violation of the Due Process Clause, the district court would generally have discretion to decide if the relief should be a new trial or a remittitur. It simply would not have discretion to leave the award in place. Fourth, the abuse-of-discretion standard underscores that there are multiple grounds for an appellate court to overturn the denial of a Rule 59 motion apart from the constitutionality of the verdict.

This Court should reject the proposal by certain law professor *amici* that the standard of review should be an adaptation of the "rational factfinder" test of *Jackson* v. *Virginia*, 443 U.S. 307 (1979), whereby a punitive damages verdict would be upheld if, construing the evidence in favor of the verdict, a rational juror could award such damages. First, the "rational factfinder" test is a measure of the sufficiency of the evidence to determine whether a judgment of acquittal should be entered for a criminal defendant. It has nothing to do with new-trial motions, where the district court (in both criminal and civil cases) independently evaluates the evidence and the credibility of witnesses to determine if the verdict is unjust. Second, the "rational factfinder" test is inapposite because punitive damages awards are not findings of historical or predictive fact like determinations of criminal guilt, but are discretionary determinations by the jury of optimal retribution and deterrence. Third, that test is flatly inconsistent with *BMW*. In *BMW*, this Court did not simply re-examine record evidence to determine if it could support the jury's verdict, but it undertook an independent legal analysis of 1) the degree of reprehensibility of conduct as measured against standards set forth in legislation and judicial cases, 517 U.S. at 575-80; 2) the ratio of punitive damages to compensatory damages, *id.* at 580-83; and 3) the treatment of comparable conduct in statutes and judicial decisions, *id.* at 583-85.

In this case, the court of appeals invoked the abuse-of-discretion standard, but it did not conduct the required independent analysis of the federal *BMW* guideposts to determine whether the verdict violated the Due Process Clause. The judgment below should be vacated and remanded.

ARGUMENT

I. FEDERAL APPELLATE COURTS INDEPENDENTLY DETERMINE THE CONSTITUTIONALITY OF A PUNITIVE DAMAGES AWARD IN REVIEWING DISTRICT COURT NEW-TRIAL RULINGS FOR ABUSE OF DISCRETION.

Juries, federal district courts, and appellate courts all have distinct roles and responsibilities in cases where a civil plaintiff seeks punitive damages in addition to compensation for harm suffered. While it is the role of the jury to determine whether to impose punitive damages and in what amount, district courts exercise an historic discretion, authorized by Federal Rule of Civil Procedure 59, to set aside verdicts in order to prevent injustice. State law, under which claims for punitive damages commonly arise, establishes criteria that guide not only the jury's imposition of punitive damages but also the district court's determination of when damages are excessive. *Gasperini* v. *Center For Humanities, Inc.*, 518 U.S. 415, 430-31 (1996). Additionally, this Court's recent decisions have made clear that the Due Process Clause sets outer limits on the extent of such punishment. *BMW of N. Am.* v. *Gore*, 517 U.S. 559 (1996). Appellate review of punitive damages awards is an essential "control" necessary to ensure that the punishment of defendants, even if warranted, is not unjust or contrary to law. *Gasperini*, 518 U.S. at 435.

This Court has held that the proper standard of appellate review of district court rulings on new trial motions to set aside excessive damages verdicts is abuse of discretion, *Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989); *Gasperini*, 518 U.S. at 431 n.12, 434-35, but nothing in that standard compromises the power and duty of an appellate court to conduct independent analysis of whether the verdict violates the Due Process Clause. As this Court has stated, even under an abuse-of-discretion standard,

"[t]he deference that is due depends on the nature of the question presented." *Koon* v. *United States*, 518 U.S. 81, 98 (1996). More critical than the label attached to the standard of review is that this Court clarify the respective roles of federal district and appellate courts: namely, the broad discretion of the district court, applying state law standards, to prevent injustice by setting aside damages awards that are excessive or infected by procedural error; the duty of the appellate court to ensure that the district court did not abuse its discretion in so doing; and the independent duty of the appellate court to apply (without any deference to the district court) the federal constitutional standards established in *BMW* to determine whether the verdict is so grossly excessive as to deny due process.

A. District Courts Have Discretion Under Federal Rule Of Civil Procedure 59 To Set Aside Excessive Damages Awards Even If Those Awards Do Not Violate The Due Process Clause.

In federal court, district courts review challenges to the excessiveness of punitive damages awards by the authority granted by Federal Rule of Civil Procedure 59. See *Gasperini*, 518 U.S. at 438 n.22 ("It is indeed 'Hornbook' law that a most usual ground for a Rule 59 motion is that 'the damages are excessive'") (citing C. Wright, *Law of Federal Courts* 676-77 (5th ed.1994)); *Browning-Ferris*, 492 U.S. at 279. Rule 59 prescribes that "[a] new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59. ,Accordingly, under Rule 59, a district court has discretion to grant a new trial on the grounds "that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving," and it may rule on "questions of law arising out of alleged substantial errors in admission or

rejection of evidence or instructions to the jury." *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 251 (1940). If it finds that the damages award was excessive, the district court may grant a new trial outright, or it may deny the motion upon the condition that the plaintiff remit the excessive portion of the damages, a practice known as remittitur. *Dimick* v. *Schiedt*, 293 U.S. 474, 484-85 (1935).

The authority of district courts to grant new trials for excessive damages under Rule 59 is "large." *Gasperini*, 518 U.S. at 433. In performing its obligations under Rule 59, the district court judge sits as a "thirteenth juror," in the limited sense that it must evaluate and weigh the evidence independently. See *Applebaum* v. *United States*, 274 F. 43, 46 (7th Cir. 1921) ("In order properly to exercise [the discretion to set aside a verdict,] it is manifest that the trial judge, as well as the jurors, should attentively consider and weigh the evidence as it is being introduced, because in that respect he is sitting as the thirteenth juror"); see also *Southern Ry.-Carolina Div.* v. *Bennett*, 233 U.S. 80, 87 (1914) ("a case of mere excess upon the evidence is a matter to be dealt with by the trial court"); *Complete Auto Transit, Inc.* v. *Floyd*, 249 F.2d 396, 399 (5th Cir. 1957) (unlike appellate courts, district courts have discretion to set aside verdicts that are excessive "as a matter of fact"); cf. *Tibbs* v. *Florida*, 457 U.S. 31, 42 (1982) (describing a court as sitting as a "thirteenth juror" when it considers, and potentially disagrees with, "the jury's resolution of the conflicting testimony"). A district court is not free to set aside a jury's verdict simply because it would have awarded a different amount, but "'[i]f it should clearly appear that the jury . . . have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case.'" *Gasperini*, 518 U.S. at 433 (quoting *Blunt* v. *Little*, 3 F. Cas. 760, 761-62 (No. 1,578) (C.C. Mass. 1822) (Story, J.)). Because the district court has the unique prerogative and duty to weigh the evidence independently, without obligation

to construe the evidence in favor of the verdict, in the federal system (as at common law[2]) the grant of a new trial for excessive damages, or a remittitur, is confided to the sound discretion of the district court. *Gasperini*, 518 U.S. at 435 ("'We must give the benefit of every doubt to the judgment of the trial judge.'") (quoting *Dagnello* v. *Long Island R.R.*, 289 F.2d 797, 806 (2d Cir. 1961)); *Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam) ("The authority to grant a new trial . . . is confided almost entirely to the exercise of discretion on the part of the trial court."); *Byrd* v. *Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 540 (1958).

In conducting its discretionary review of punitive damages awards for excessiveness, the district court draws on its special institutional competencies vis-à-vis the jury to prevent injustice. Unlike compensatory damages, which involve assessment of historical or predictive facts, "the level of punitive damages is not really a 'fact' 'tried' by the jury." *Gasperini*, 518 U.S. at 469 (Scalia, J., dissenting). As the Fourth Circuit recognized, "[t]he jury's determination of the amount of punitive damages . . . is not a factual determination about the degree of injury but is, rather, an almost unconstrained judgment or policy choice about the severity of the penalty to be imposed, given the jury's underlying factual determinations about the defendant's conduct." *Atlas Food Sys. & Servs., Inc.* v. *Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996); cf. *Lockhart* v. *McCree*, 476 U.S. 162, 183 (1992) (noting, in the context of capital sentencing, that a jury exercises far greater discretion in imposing punishment

[2] *See Bright* v. *Eynon*, 97 Eng. Rep. 365, 368 (K.B. 1757) (Denison, J.) ("[I]t would be difficult perhaps to fix an absolutely general rule about granting new trials; without making so many exceptions to it, as might rather tend to darken the matter, than to explain it: but the granting a new trial, or refusing it, must depend upon the legal discretion of the Court; guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice."); *see also Gasperini*, 518 U.S. at 445 n.5 (Steven, J., dissenting).

than in "the jury's more traditional role of finding the facts and determining the guilt or innocence of a criminal defendant"). These are not judgments that juries are institutionally more competent or legitimate to make than are judges.

Without displacing the primacy of the jury in awarding punitive damages, a district court conducting Rule 59 review provides an essential and principled check on arbitrary punishment, making "certain that [the awards] are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 21 (1991). Whereas a jury is a one-time participant in the legal system with no experience beyond the single case before it, "the district courts not only see punitive damages awards daily, but themselves are required frequently to impose penalties for punishment and deterrence in a wide array of circumstances, both in civil and in criminal contexts." *Atlas*, 99 F.3d at 594; see, *e.g.*, *Tull* v. *United States*, 481 U.S. 412, 426-27 (1987) (noting that "highly discretionary" statutory civil-penalty calculations are more traditionally the province of judge rather than jury). Although a district court may set aside a punitive damages award because it is unwarranted by the evidence, a ruling that damages are excessive also may turn on determinations requiring judicial expertise, such as comparing the treatment of similar conduct in other cases or in legislation imposing sanctions. See *BMW*, 517 U.S. at 583 (citing *Browning-Ferris*, 492 U.S. at 301 (O'Connor, J., concurring in part and dissenting in part)). The substantial discretion afforded trial judges under Rule 59 to prevent the injustice of excessive punitive damages awards reflects their unique position of having both firsthand exposure to the evidence in a particular case and the institutional capacity to ensure that punishment is not meted out arbitrarily across cases.

Despite the broad leeway accorded to the district courts, state and federal law prescribe standards for (and limits upon)

a district court's exercise of Rule 59 discretion. See *Browning-Ferris*, 492 U.S. at 279 ("[I]n reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered."). As this Court has noted, in diversity cases, "state law governs the amount properly awarded as punitive damages, subject to an ultimate federal constitutional check for exorbitancy." *Gasperini*, 518 U.S. at 431 n.12.

The federal constitutional limit stems from the Due Process Clause, which this Court has interpreted to prohibit a State from imposing a punitive damages award that is "grossly excessive." *BMW*, 517 U.S. at 575; *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 454 (1993). In *BMW*, this Court identified three "guideposts" to determine when an award meets this constitutional threshold: "the degree of reprehensibility of the [underlying conduct]; the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *BMW*, 517 U.S. at 575. Because these are federal constitutional standards, this Court conducted independent *de novo* analysis of whether the verdict was so grossly excessive as to violate the Due Process Clause, without regard to any discretionary determinations of the state courts in applying state standards of excessiveness.

The Court never intimated, however, that these guideposts were unique to a due process inquiry; to the contrary, it suggested that they were traditional indicia of the reasonableness of an award. See *id.* at 575 & n.23 (citing degree of reprehensibility as "the most important indicium of the reasonableness of a punitive damages award" because "'[t]he flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive

damages'") (quoting Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 Vill. L. Rev. 363, 387 (1994)); *id.* at 580 (stating the "most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff," and noting the "long pedigree" of the ratio or proportionality principle in the case law). Indeed, under Rule 59, courts have long considered such factors in determining whether punitive and compensatory awards are excessive, often because state laws have explicitly incorporated these, or similar, factors into their own definition of "excessiveness."[3]

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[3] *See, e.g.*, *Shaw* v. *Titan Corp.*, No. 96-2143, 1998 WL 277045, at *4 (4th Cir. May 18, 1998) (unpublished) (considering, in accord with Virginia law, such factors as the ratio of the punitive damages award to harm suffered and the "measurement of punishment required"); *Cline* v. *Wal-Mart Stores, Inc.*, 144 F.3d 294, 306-07 (4th Cir. 1998) (finding that the punitive damages award resulted in a "miscarriage of justice," after considering "the harm suffered by [plaintiff]; the degree of [defendant's] indifference towards [plaintiff's] rights . . . ; and the policy judgments inherent in any award of punitive damages"); *Mathie* v. *Fries*, 121 F.3d 808, 813 (2d Cir. 1997) (in reviewing a compensatory damages award, stating that "the determination of whether a damages award exceeds a reasonable range 'should not be made in a vacuum,' but should include consideration of the amounts awarded in other, comparable cases") (citation omitted); *Jenkins* v. *Raymark Indus. Inc.*, 782 F.2d 468, 474 (5th Cir. 1986) (under Texas law, when determining whether an award is excessive a court must consider such factors as "the nature of the wrong," "the character of the conduct involved," and "the degree of culpability of the wrongdoer"); *Joan W.* v. *City of Chicago*, 771 F.2d 1020, 1025 (7th Cir. 1985) (finding a compensatory damages award to be "fragrantly extravagant" in light of "the totality of the evidence and comparing this case to the other similar cases"); *Transgo, Inc.* v. *Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1025 (9th Cir. 1985) (noting that California law "requires that punitive damages bear a reasonable relationship to compensatory damages"); *T.D.S. Inc.* v. *Shelby Mut. Ins. Co.*, 760 F.2d 1520, 1530 (11th Cir. 1985) (under Florida law, punitive damages must not be "out of all reasonable proportion to the malice, outrage, or wantonness of the tortious conduct").

Because it may consider factors akin to the *BMW* guideposts as part of its Rule 59 excessiveness inquiry, a district court will generally not invoke the Due Process Clause to set aside a verdict that it would let stand as a matter of its discretion. Cf. *Grunewald* v. *United States*, 353 U.S. 391, 421 (1957) (avoiding Fifth Amendment question by ruling that district court as a matter of discretion should have refused to allow impermissible cross-examination). In other words, if the district court does not find a verdict to be "excessive" under Rule 59 after considering such factors, *a fortiori* the district court will not declare the award "grossly excessive" and thus unconstitutional under *BMW*. *BMW* is directly relevant to the district court only as a limit upon its discretion to *uphold* a punitive damages award. In those circumstances, *BMW* obliges a district court (in addition to applying state law standards) to analyze the constitutional guideposts and to make the legal determination of whether the award is so "grossly excessive" as to violate the Due Process Clause. *BMW*, 517 U.S. at 525; *Gasperini*, 518 U.S. at 431 n.12.

In summary, the decision to grant or deny a new trial, or deny it subject to remittitur, is an inherently discretionary determination of the district court, subject to the standards and limits imposed by state law and the Due Process Clause.[4]

[4] Although the Rule 59 excessiveness standard is governed in part by state law, where state law provides the basis for liability, there are limits on the extent to which state law can reduce a federal court's discretion to review the size of jury verdicts under Rule 59. Attempts to constrain the historic judicial discretion to review jury verdicts raise procedural due process concerns. *See Honda Motor* v. *Oberg*, 512 U.S. 415, 434 (1994) (finding that Oregon statute that prohibited judicial review "unless the court can affirmatively say there is no evidence to support the verdict" violated Due Process); *see also Pacific Mut. Life Ins.*, 499 U.S. at 18 ("One must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities"). Nothing in the current Oregon review statute, *see* Or. Rev. Stat. § 18.537(2), prohibits a court's discretionary consideration of the *BMW* factors in determining the excessiveness of the verdict.

B. Because Rule 59 Motions Implicate The Substantial Discretion Of District Courts, The Proper Appellate Standard Of Review Is Abuse Of Discretion.

Because the district court has discretion to set aside excessive verdicts under Rule 59, above and beyond any legal duty to declare "grossly excessive" verdicts unconstitutional under *BMW*, the proper appellate standard of review is abuse of discretion, as this Court has ruled. See *Browning-Ferris*, 492 U.S. 257, 279 ("The court of appeals should . . . review the district court's [Rule 59] determination under an abuse-of-discretion standard"); see also *Neese* v. *Southern Ry.*, 350 U.S. 77, 77 (1955) (finding no abuse of discretion in decision to uphold a punitive damages verdict). The Court reiterated this standard in *Gasperini*, 518 U.S. at 434-35, even as it recognized that both state law and the Due Process Clause channeled and limited the district court's Rule 59 discretion to evaluate the excessiveness of a punitive damages award, *id.* at 431 n.12. But invocation of that standard is only the first step in the reviewing court's analytical process. The key inquiry becomes how that phrase gets applied to the myriad points of dispute about the propriety of a particular jury's verdict.

1. Abuse Of Discretion Is The Proper Standard Even Though Rule 59 Decisions May Involve Questions Of Law, Such As The Constitutionality Of The Verdict.

As this Court recognized in *Gasperini*, the presence of legal questions in a Rule 59 determination does not alter the standard of review. There should be no doubt that, considered independently, the question of whether a verdict is so "grossly excessive" as to violate the Due Process Clause is a legal question that an appellate court resolves *de novo* (*i.e.*,

without deference to the district court's determination of the verdict's constitutionality). As this Court has held in similar contexts, when the question under review "calls for the application of a constitutional standard to the facts of a particular case . . . *de novo* review of that question is appropriate." *United States* v. *Bajakajian*, 524 U.S. 321, 336 n.10 (1998) (excessiveness of fines under the Eighth Amendment); *Ornelas* v. *United States*, 517 U.S. 690, 697 (1996) (determining *de novo* the reasonableness of a search or seizure under the Fourth Amendment); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284-85 (1964) (determining *de novo* the existence of actual malice to defame under the First Amendment).

Nonetheless, a Rule 59 determination does not involve strictly or even primarily issues of the constitutionality of the verdict, and this Court has favored a single, unitary appellate standard of review that applies to the entirety of the district court's order. In particular, when an issue implicates the substantial discretion of the district court, even though questions of law may arise, this Court has held repeatedly that the abuse-of-discretion standard is proper. In *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 401 (1990), this Court rejected the argument that when reviewing Rule 11 sanctions orders, it should adopt a tripartite standard based on whether the question at issue was one of law, fact or a mixed question of law and fact. It noted the difficulty generally of distinguishing between legal and factual issues, and in particular in making such distinctions in the Rule 11 context, because "[r]ather than mandating an inquiry into purely legal questions, such as whether the attorney's legal argument was correct, the Rule requires a court to consider issues rooted in factual determinations." *Id.* Similarly, in *Koon* v. *United States*, 518 U.S. 81 (1996), this Court held that an abuse-of-discretion standard was appropriate in review of federal sentencing decisions because the district court retained substantial sentencing discretion under the United States

Sentencing Guidelines, even though it recognized that district courts would "confront questions of law in deciding whether to depart" from the Guidelines. *Id.* at 98-100.

2. Appellate Courts Must Make An Independent Legal Determination Of The Constitutionality Of The Verdict Regardless Of Whether The Standard Is Abuse Of Discretion Or *De Novo*.

What is absolutely critical for proper analysis of the appellate role under Rule 59, however, is that the abuse-of-discretion standard does not require the court of appeals (or this Court) to yield to the district court's erroneous determinations of issues of law, including the constitutionality of the verdict. When a question of law arises, "the court of appeals need not defer to the district court's resolution of the point." *Id.* at 100. Accordingly, this Court has emphasized that "[l]ittle turns . . . on whether we label review of this particular question abuse of discretion or *de novo*, for an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction." *Id.* But the fact that a decision "may call for a legal determination does not mean, as a consequence, that parts of the review must be labeled *de novo* while other parts are labeled an abuse of discretion." *Id.* "A district court by definition abuses its discretion when it makes an error of law." *Id.*

Although neither *Koon* nor *Cooter & Gell* involved issues of constitutional magnitude, an abuse-of-discretion standard can also accommodate independent appellate review of constitutional questions. See *Withrow* v. *Larkin*, 421 U.S. 35, 46, 55 (1975) (holding that a district court abused its discretion in issuing a preliminary injunction because of an erroneous due process analysis); *Morris* v. *Slappy*, 461 U.S. 1, 11-12, 14 (1983) (rejecting lower court's Sixth Amendment analysis in holding that denial of a continuance was not an abuse of discretion). The adoption of an abuse-of-discretion standard does not alter the nature of appellate review of the

constitutionality of the verdict. This is not and should not be a tyranny of labels. The Due Process Clause, which applies equally to state and federal courts, requires that appellate courts perform the same rigorous and independent evaluation of whether a verdict is "grossly excessive" that this Court did in conducting *de novo* review of the verdict in *BMW*.

3. An Abuse-Of-Discretion Standard Recognizes That There Are Multiple Bases For An Appellate Court To Set Aside A Punitive Damages Award Even If It Does Not Transgress Constitutional Limits.

Although there would be little substantive difference between adopting a separate *de novo* standard of review for the constitutionality of an award, and an abuse-of-discretion standard in which the appellate court independently resolves the constitutional question of gross excessiveness by analyzing the *BMW* guideposts without deference to the district court, considerations peculiar to Rule 59 counsel in favor of the latter.

First, as noted above, a district court, sitting as a "thirteenth juror," has broad discretion under Rule 59 to set aside a punitive damages award as "excessive" even if, under the Due Process Clause, the award is not "grossly excessive" as a matter of law. In making its determination of excessiveness, the district court may in its discretion examine many of the factors—degree of reprehensibility of conduct, ratio to compensatory damages awarded, and legislative and judicial treatment of comparable conduct—that are also pertinent in the *BMW* inquiry. See *supra* at 12-14. The abuse-of-discretion standard recognizes that the district court, independently weighing the evidence and applying state standards to the facts of the case, is in a preferred position vis-à-vis the court of appeals, which has access only to "'a cold paper record'" *Gasperini*, 518 U.S. at 421, *Cooter & Gell*, 496 U.S. at 401 ("Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshal the

pertinent facts and apply the fact-dependent legal standard . . . .") The abuse of discretion standard also reinforces the profound obligation of the trial court to fulfill its role as the "thirteenth juror." A decision to remit or set aside a verdict that may have been tainted by any of dozens of possible twists at a trial is vital to ensure that civil justice system operates fairly. Thus, the abuse of discretion standard signals to the trial courts that they must take this responsibility seriously and exercise sound judgment in deciding when and how to protect defendants against unjust punitive awards.

Second, the district court will not generally reach the due process question if it sets aside the award as a matter of its Rule 59 discretion. In reviewing such a Rule 59 order,[5] the court of appeals would simply review the district court's order for abuse of discretion (resolving pure questions of state law on its own, *Salve Regina College* v. *Russell*, 499 U.S. 225, 231 (1991)), and would not engage in independent review of the verdict under *BMW* because no due process question would be presented.[6] Rather than have separate standards for denials and grants of Rule 59 motions, it simply makes sense for this Court to adopt a single, overarching abuse-of-discretion standard, but one that recognizes that all issues of law presented, constitutional or otherwise, must be

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[5] If the district court orders a new trial under Rule 59 because the damages are excessive, ordinarily an appeal is taken after the conclusion of the new trial. *Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34, 36 (1980) ("An order granting a new trial is interlocutory in nature and therefore not immediately appealable."); *see also Tri County Indus., Inc. v. District of Columbia*, 200 F.3d 836 (D.C. Cir.) (appeal taken after the second trial), *amended by*, 208 F.3d 1066 (D.C. Cir.), *cert. granted*, 121 S. Ct. 29 (2000).

[6] The exception is that, if a district court in its discretion orders only remittitur and judgment is entered for the remitted amount, the defendant may on appeal challenge the remitted amount as "grossly excessive" under *BMW*. Indeed, *BMW* itself involved a challenge to a remitted award. 517 U.S. at 581.

resolved independently by the appellate courts. See *Koon*, 518 U.S. at 100 (an error of law is by definition an abuse of discretion).

Third, even in cases where a constitutional violation is found, it would still generally be a matter of the district court's discretion to determine whether the proper remedy under Rule 59 is a new trial or remittitur. See *Gasperini*, 518 U.S. at 433; *Dimick*, 293 U.S. at 484-85; cf. *BMW*, 517 U.S. at 586 (remanding case to the state court to determine whether a new trial or a remittitur was appropriate to cure the constitutional violation). An abuse-of-discretion standard reflects the district court's leeway in formulating Rule 59 relief, even if the basis for relief is legal error.

Fourth, and significantly, a federal appellate court reviewing the size of a punitive damages award is not limited to the *BMW* analysis of the constitutionality of the verdict under the Due Process Clause. Quite apart from any constitutional challenge, defendants have long been able to appeal the district court's discretionary denial of a Rule 59 motion to set aside a damages award as excessive, and the courts of appeals have reviewed those denials for abuse of discretion. *Gasperini*, 518 U.S. at 434-35. This Court has characterized such review "as a control necessary and proper to the fair administration of justice." *Id.* at 435. For every case, "'surely there must be an upper limit'" to the amount of damages a jury may award, and whether the verdict exceeds that limit is an issue of federal law for the appellate court to decide. *Id.* (quoting *Dagnello*, 289 F.2d at 806); see also *id.* at 436; *Donovan* v. *Penn Shipping Co.*, 429 U.S. 648, 649 (1977) (per curiam).

In conducting this inquiry, a court of appeals determines whether the district court properly exercised its discretion under the excessiveness standards established by state law in letting a verdict of that size stand. Such appellate review is vital to the vindication of governing state law and the principles of *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938).

As this Court held in *Gasperini*, "[i]n light of *Erie*'s doctrine, the federal appeals court must be guided by the damage-control standard state law supplies," even as it gives deference to the discretion afforded the district court under Rule 59. 518 U.S. at 438. Thus, a court of appeals must reverse a denial of a new trial as an abuse of discretion if a district court simply rubberstamped the jury's verdict, and failed to engage in reasoned consideration of state law standards. Cf. *United States* v. *U.S. Currency, In The Amount Of $103,387.21*, 863 F.2d 555, 561 (7th Cir. 1988) ("An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered or when the court 'fails to analyze the applicable factors.'"). Moreover, even if the district court did address those factors, the court of appeals must reverse if as a matter of law the damages award is excessive under the state-law standards. *Gasperini*, 518 U.S. at 435.

Nonetheless, as this Court made clear in *BMW*, the fact that a verdict may not be excessive under state-law standards does not end the inquiry. 517 U.S. at 566-67 (setting aside damages award even though the Alabama Supreme Court had definitively ruled that the award satisfied state excessiveness standards). To ensure that the verdict comports with the Due Process Clause, the federal appellate court must also undertake an independent analysis of whether, as a matter of law, the verdict is grossly excessive under the *federal* constitutional standards identified in *BMW*.

Thus, a federal appellate court must make two separate legal analyses before it may uphold a punitive damages award: (1) it must determine whether the district court properly applied state-law standards in deciding whether damages are evasive, and (2) it must independently determine, based on the federal constitutional standards of *BMW*, whether the verdict violates the Due Process Clause. These are separate legal analyses, but they are in service of a single determination: namely, whether the verdict is grossly excessive as a

matter of law.[7] Because the appellate court is making a single determination, it simply makes sense for there to be a single, unitary standard of review. That standard should be abuse-of-discretion, which allows for appellate correction of errors of law without deference to the district court. *Koon*, 518 U.S. at 100. If the district court failed to grant a Rule 59 motion to set aside what a court of appeals determines to be an unconstitutional verdict, that is *per se* an abuse of discretion.

A final consideration in support of an abuse of discretion standard is that a defendant will often challenge a punitive damages award under Rule 59 on multiple grounds, and not solely on the size of the award. A defendant may challenge the jury instructions on damages, or the admission or exclusion of evidence bearing on reprehensibility of conduct or the actual or potential harm to plaintiffs, or prejudicial argument to the jury by opposing counsel. See *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 251 (1940) (jury instructions and evidentiary rulings subject to challenge on Rule 59 motion).[8] The district court has broad discretion in admitting

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[7] Thus, it is not surprising that courts have used the term "grossly excessive" or its equivalent in identifying the kind of verdict which it would be an abuse of the district court's discretion to let stand. *See Grunenthal* v. *Long Island R.R.*, 393 U.S. 156, 159 n.4 (1968); *Peck* v. *Garfield*, 862 F.2d 1, 5 (1st Cir. 1988) ("[A] court will not be said to have abused its discretion in denying a motion for a new trial based on an excessive damage award unless the jury's verdict is grossly excessive or shocking to the conscience."); *Smith* v. *Rowe*, 761 F.2d 360, 368 (7th Cir. 1985) (stating that appellate court would reverse lower court if "the verdict was so 'gross' or 'monstrously excessive' that the trial court abused its discretion in permitting it to stand"); *Complete Auto Transit, Inc.* v. *Floyd*, 249 F.2d 396, 399 (5th Cir. 1957) ("[T]he appellate court will declare that the trial court has abused its discretion if the verdict is so gross or inordinate in amount as to be contrary to right reason . . . .").

[8] *See also Caruolo* v. *John Crane, Inc.*, 226 F.3d 46 (2d Cir. 2000) (reviewing defendant's motion for a new trial on the basis of wrongly admitted evidence, improper jury instructions, and improper summation); *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d 95, 110 (4th Cir. 1991)

or excluding evidence, formulating jury instructions, and controlling attorney misconduct. See *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 141 (1997) (evidentiary rulings reviewed for abuse of discretion); *United States* v. *Stouffer*, 986 F.2d 916, 925 (5th Cir. 1993) (formulation of jury instructions reviewed for abuse of discretion); *United States* v. *Poole*, 207 F.3d 893, 899 (7th Cir. 2000) (district court's denial of a new trial motion alleging attorney misconduct during closing argument reviewed for abuse of discretion). However, if the defendant is prejudiced, see Fed. R. Civ. P. 61, a federal appellate court may nonetheless hold that the district court abused its discretion in not ordering a new trial because of evidentiary, instructional, or procedural error that may have affected the size of the punitive damage award, even if the award was not grossly excessive under *BMW*.[9] An

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(considering defendant's contention that the district court erred in admitting witness testimony and in instructing the jury); *Jordan* v. *Clayton Brokerage Co.*, 861 F.2d 172, 176 (8th Cir. 1981) (rejecting the argument that the district court improperly admitted prejudicial evidence and failed to instruct jury so as to mitigate the prejudice), *vacated on other grounds*, 499 U.S. 914 (1991); *Rodgers* v. *Fisher Body Div., Gen. Motors Corp.*, 739 F.2d 1102, 1106 (6th Cir. 1984) (considering, as errors that affected the compensatory and punitive damage awards, inaccurate jury instructions and the plaintiff's improper closing argument to the jury). *Cf. Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993) (recognizing the gatekeeping role of the trial judge in admitting scientific evidence). A party may appeal evidentiary, instructional, and procedural rulings simply as trial error, but, as the cases above illustrate, it is common for those issues to be raised as a claim of error in denying a Rule 59 motion.

[9] This Court has repeatedly emphasized the courts must ensure that discretion is exercised according to legal principles. *See United States* v. *Taylor*, 487 U.S. 326, 335 (1988) ("Whether discretion has been abused depends, of course, on the bounds of that discretion and the principles that guide its exercise."); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975) ("[D]iscretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" (quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (CC Va. 1807) (No. 14,692d) (Marshall, C.J.)).

abuse-of-discretion standard recognizes the many bases, apart from constitutional defects, for setting aside a punitive damages award.

Although abuse-of-discretion is the proper formulation of the appellate standard for review of a district court's Rule 59 rulings, at the end of the day it is of little importance whether this Court formally declares that standard, or adopts a two-part standard under which the constitutional review of *BMW* is recognized to be *de novo*. See *Koon*, 518 U.S. at 100. What is important is that this Court clarify for the courts of appeals the substantive analysis that they must undertake in reviewing punitive-damages awards: namely, (1) whether the district court improperly applied state-law standards in determining that the damages were excessive, and (2) whether, by independent and *de novo* application of the federal constitutional standards set forth in *BMW*, the verdict violates due process.

Although the Ninth Circuit invoked the abuse-of-discretion standard, Pet. App. 4a, nothing in the record suggests that it conducted the searching, independent legal analysis of the *BMW* guideposts that is required under the Due Process Clause in federal as well as state court. To the contrary, its offhand statement that the district court's "findings were supported by the evidence, such that the award did not violate Cooper's due process rights," *id.* at 3a, indicates an inappropriate deference to the district court in determining whether a constitutional violation occurred. For that reason, even though the AAR's analysis may depart in some respects from the position of petitioner, it believes that the decision should be vacated and remanded for proceedings in compliance with the standards outlined above.

II. THE "RATIONAL FACTFINDER" TEST IS NOT THE PROPER STANDARD.

In their Brief in Support of Petitioner at the certiorari stage, *Amici Curiae* Erwin Chemerinsky and Arthur F. McEvoy

argue for what they call "*de novo* review of what is termed a 'legal' issue under a 'rational factfinder' standard." *Amici* Br. at 3. This standard fails to accord federal district courts sufficient discretion in their review of jury verdicts; mistakes sufficiency-of-the-evidence standards for new-trial standards; and in any case misapprehends the nature of the *BMW* analysis.

The law professor *amici* simply ignore that the federal district court, in disposing of a Rule 59 motion, is entitled to reweigh the evidence, drawing its own inferences and assessing witness credibility. See *supra* at 9-10. In discussing their preferred standard, the law professor *amici* baldly state that "there is no discretion actually accorded the district court" in regard to the evidence, *Amici* Br. at 4, and that "excessiveness is treated as a 'legal' question, decided on the record with all legitimate factual inferences drawn in favor of the jury's result." *Id.* There is simply no basis in the law for the contention that under Rule 59 the district court has no more discretion than an appellate court to reevaluate the evidence, or that the district court must accept the evidence as found by the jury. Indeed, if a district court in ruling on a Rule 59 motion were to hold that certain evidence relevant to a punitive damages award was incredible, or to hold that the award could not be justified on the evidence of record, a federal appellate court should review that determination for abuse of discretion, rather than simply construe the evidence in favor of the verdict.

The *amici*'s invocation of the "rational factfinder" standard of *Jackson* v. *Virginia*, 443 U.S. 307, 324 (1979), betrays their misunderstanding of Rule 59 motions. The *Jackson* standard is a sufficiency-of-the evidence standard for criminal trials under the Due Process Clause that determines when judgment of acquittal must be entered, and its civil analogue is not a Rule 59 motion for a new trial but a Rule 50 motion for judgment as a matter of law. See Fed. R. Civ. P. 50; *Brady* v. *Southern Ry.*, 320 U.S. 476, 479-80 (1943) (civil

judgment as a matter of law appropriate where there is but "one reasonable conclusion as to the verdict"). As this Court held in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243 (1940), these two motions serve different functions and are determined by wholly different standards. *Id.* at 251. To the extent any criminal analogue were even relevant, it would be the standard for new trials under Federal Rule of Criminal Procedure 33. That standard, it is well established, accords the district court discretion to grant a new trial based on its own evaluation of the evidence as "a thirteenth juror." 3 Wright & Miller, *Federal Practice & Procedure* § 553 (1982).

Finally, even if an appellate court confronting a specific evidentiary issue unaddressed by the district court were entitled to draw "reasonable inferences" in favor of the verdict, based on its review of the record as a whole, *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2110 (2000),[10] that is a far cry from establishing *Jackson*'s "rational factfinder" test as the legal standard by which to conduct the *BMW* analysis of the constitutionality of a jury verdict.

First, the "rational factfinder" standard is inapposite because an award of punitive damages is not at all a finding of fact analogous to a verdict of guilty in a criminal case. Unlike a guilty verdict, which rests on evidence that is a matter of historical fact, "the level of punitive damages is not really a 'fact' 'tried' by the jury." *Gasperini* v. *Center For Humanities, Inc.*, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting). The jury's award of punitive damages depends in part on historical fact, but also on its own policy judgments as to such factors as deterrence and retribution. As such, review of the award for mere rationality is insufficient. Gross excessiveness remains a legal determination for the court, and not

[10] The appellate court need not credit internally contradictory or impeached evidence, or evidence wholly inadequate to support a damages verdict.

simply a judicial check on the rationality of a jury's finding of fact.

Second, the rational-factfinder test is in conflict with *BMW* itself. Nothing in that decision suggests that an appellate court conducts a review solely of the evidence of record to determine whether it supports a jury's verdict. Rather, the three "guideposts" this Court identified in *BMW* are legal, judicial determinations to ascertain whether the verdict comports with "[e]lementary notions of fairness" and whether the defendant "receive[d] fair notice . . . of the severity of the penalty that a State may impose." *BMW of N. Am.* v. *Gore*, 517 U.S. 559, 574 (1996). Thus, in determining the degree of reprehensibility of the defendant's conduct, this Court did not confine itself to evidence of record but examined case law and statutes relevant to the gravity of certain kinds of conduct, *id.* at 575-76. This is not simply review of the rationality of a jury finding. Similarly, the determination of the proportional relationship between a ratio of compensatory and punitive damages is a legal standard for gauging the reasonableness of the damages award in various circumstances, *id.* at 580-82, and not an examination of the record to find support for the jury's verdict. Finally, the comparison of the punitive damages award to legislative sanctions for comparable conduct is a legal inquiry that no jury undertakes. *Id.* at 583-84. The law professors' "rational factfinder" standard is simply fish out of water in *BMW* review of the constitutionality of a punitive damages award.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be vacated and remanded for proceedings in compliance with the standards outlined in this brief.

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